LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 11 1972
MICHAEL RODAK, JR., CLERK

No. 71-938

In the Supreme Court of the United States

OCTOBER TERM, 1971

WINNEBAGO TRIBE OF NEBRASKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

KENT FRIZZELL,
Assistant Attorney General,

ROBERT S. LYNCH,
DIRK D. SNELL,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-938

WINNEBAGO TRIBE OF NEBRASKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in this consolidated appeal (Pet. App. 24-29) is reported at 451 F. 2d 667. The opinion of the United States District Court for the District of Nebraska (Pet. App. 30-40) is reported at 319 F.Supp. 128, and that court's subsequent memorandum and order (Pet. App. 41-44) are unreported. The order of the United States District Court for the Northern District of Iowa (Pet. App. 45-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1971. The petition for a writ of certiorari was filed on January 19, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there is a right of appeal from an order entered in a federal condemnation proceeding, prior to the valuation trial, denying the condemnee's challenge to the validity of the taking.

STATUTE INVOLVED

28 U.S.C. 1292 is set forth at Pet. App. 21-22.

STATEMENT

The government instituted separate condemnation proceedings, one in the district court in Nebraska, and related ones in the district court in Iowa, to obtain certain lands situated along the Missouri River in Nebraska and Iowa for a government-constructed recreational project known as the Oxbow Recreation Lakes, Snyder-Winnebago Complex. The Nebraska district court struck certain pleadings proferred by petitioner and granted the government's motion for summary judgment that it had authority to condemn the lands in question (319 F. Supp. 128; Pet. App. F). The Iowa district court followed those rulings (Pet. App. H). The cases were consolidated on appeal, and the court of appeals held that the district courts' orders were not appeal-

able and accordingly dismissed the appeals (Pet. App. E).

The facts are largely undisputed and are set forth fully in the opinions of the court of appeals and of the Nebraska district court. Petitioner, as one of several condemnees in the three separate proceedings here (one in Nebraska and two in Iowa), claimed ownership of some of the lands in issue as tribal land reserved to it by the Treaty with the Winnebago Indians of 1865, 14 Stat. 671. It contended that federal statutes authorizing and funding the recreational facility did not abrogate the 1865 Treaty, and that the United States consequently had no authority to take Winnebago lands by condemnation. (Pet. App. E, p. 25.)

In the Nebraska proceedings, the allegations concerning the government's authority to condemn petitioner's treaty lands, as well as a motion for preliminary injunction and for summary judgment, were made in supplemental pleadings filed after petitioner's answer to the complaint (*ibid.*). The Nebraska district court concluded that these matters were "in effect a supplemental answer and counterclaim," the filing of which was barred by the requirement of Rule 71A(e), Federal Rules of Civil Procedure, "that all objections or defenses to the taking must be asserted in the answer, [and] no other pleading or motion is allowed" (Pet. App. F, p. 34). It held that condemnation of the lands in question had been properly authorized (*id.* at pp. 37-40). The Iowa district court "agree[d] with" these rulings and hence struck a counterclaim and amended counterclaim and granted

summary judgment for the government upholding its authority to condemn petitioner's lands (Pet. App. H, pp. 46, 47).[1]

The Nebraska court refused to certify its decision for interlocutory appeal under 28 U.S.C. 1292(b) because "there is [no] substantial ground for a difference of opinion" on the government's authority and the possibility that petitioner will sustain irreparable harm from the project "is at best only slight" (Pet. App. G, pp. 42, 44). Certification was not sought in the Iowa proceedings.

The court of appeals dismissed the petitioner's appeals from these orders for want of jurisdiction. On the authority of *Catlin* v. *United States*, 324 U.S. 229, it concluded that the orders were not final judgments from which an appeal would be authorized under 28 U.S.C. 1291 since, in view of the fact that title and just compensation issues must still be decided, they did not "dispose of the litigation" (Pet. App. E, p. 27). The court held that it had "no jurisdiction to review" the Nebraska court's refusal to certify an interlocutory appeal under 28 U.S.C. 1292 (b), and that the orders striking proferred additional pleadings "are rulings on pleadings under Rule 71A (e) * * * [and therefore] are clearly interlocutory rulings and are not appealable" (*id.* at p. 28).

---

[1] Petitioner did not seek a temporary injunction in the Iowa proceedings (Pet. App. E, p. 29).

ARGUMENT

The decision below dismissing petitioner's appeal is correct and presents no conflict of decisions or other question warranting review by this Court.

1. It is well established that pretrial decisions overruling objections to the condemnor's authority to take property are not appealable "final decisions" under 28 U.S.C. 1291. *Catlin* v. *United States*, 324 U.S. 229, 233, 236. This "general rule that condemnation orders prior to determination of just compensation are not appealable," *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 69 n. 2, has never been overruled or qualified. The only time such an interlocutory decision may be appealed is when the district court, pursuant to 28 U.S.C. 1292(b), certifies that it "involves a controlling question of law as to which there is substantial ground for difference of opinion." The Nebraska court refused certification because those conditions were not satisfied in this case, and that refusal is not reviewable either by appeal, see *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 340 F. 2d 160 (C.A. 2), certiorari denied, 381 U.S. 924, or by extraordinary writ, see *Hirsch* v. *Bruchhausen*, 284 F. 2d 783, 784, 786 (C.A. 2).

A motion for a preliminary injunction, such as was filed here in the Nebraska case, does not support a different result in the present context. As the Nebraska district court pointed out (Pet. App. F, p. 34), the only response permitted in a condemnation proceeding under Rule 71A(e) is an answer; hence petitioner's motion was correctly stricken. An injunc-

tion is not an available means of testing the government's authority to condemn. Compare *Delaware Valley Conservation Association* v. *Resor*, 392 F. 2d 331, 333-335 (C.A. 3); certiorari denied, 393 U.S. 915; see also *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 687, 704; *Malone* v. *Bowdoin*, 369 U.S. 643, 646-647. Thus, interlocutory appeal under 28 U.S.C. 1292(a), on which petitioner also relies (Pet. 8-11), is not applicable to the instant case.

2. Nor is there any real question concerning the government's authority to condemn the lands here in question. As this Court observed in *United States* v. *Reynolds*, 397 U.S. 14 n. 1, Section 4 of the Flood Control Act of 1944, 58 Stat. 889, as amended, 16 U.S.C. 460d, expresses a long-standing "Government policy to build recreational areas in conjunction with federal reservoir projects * * *." The project involved here comports fully with the broad authorization embodied in Section 4 of the 1944 Act. Indeed, the nature and location of the instant project, which was finally funded by the 1970 Public Works Appropriation Act (83 Stat. 323, 325), was explicitly considered during legislative deliberations in three sessions of Congress.[2] As the Nebraska district court concluded (Pet. App. F, pp. 37-40), the authorization is not any less suf-

[2] Hearings on Public Works Appropriations for 1970, House Subcommittee of the Committee on Appropriations, 91st Cong., 1st Sess. (1969), pt. 1, pp. 745-748; Hearings on Public Works Appropriations for 1969, House Subcommittee of the Committee on Appropriations, 90th Cong., 2d Sess. (1968), pt. 1, pp. 524, 526; Hearings on H.R. 11641, Senate Subcommittee of the Committee on Appropriations, 90th Cong., 1st Sess. (1967), pt. 1, pp. 1332-1333.

ficient because some of the lands to be used are tribal lands obtained by petitioner pursuant to treaty. Compare *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120-123, and cases there cited. See also *Seneca Nation of Indians* v. *United States*, 338 F. 2d 55 (C.A. 2), certiorari denied, 380 U.S. 952.[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

ROBERT S. LYNCH,
DIRK D. SNELL,
Attorneys.

MARCH 1972.

---

[3] The "Standing Rock" case, *United States* v. *2,005.32 Acres of Land, Etc.*, 160 F. Supp. 193 (D. S.D.), vacated and remanded with instructions to dismiss as moot, 259 F. 2d 271 (C.A. 8), on which petitioner relies (Pet. 12), is distinguishable. One of the statutes involved there required that the government acquire the necessary lands by contracts with the Standing Rock Sioux, and the contracts were expressly made subject to later ratification by Congress. The court emphasized that the contracts had not been negotiated before condemnation proceedings were started (160 F. Supp. at 200).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 489726-552